Filed 8/7/19 In re D.M. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.M., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.E., Defendant and Appellant.	E072517 (Super.Ct.No. J273095) OPINION

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes, Judge. Affirmed.

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel and Jamila Bayati, Deputy County Counsel for Plaintiff and Respondent.

S.E. (mother) appeals the order terminating her parental rights and freeing her 18-month-old son, D.M., for adoption by the maternal aunt. Mother argues the juvenile court erred in failing to apply the parental benefit exception to terminating parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i), unlabeled statutory citations refer to this code.) We disagree.

D.M. was detained at birth and has spent his whole young life in his aunt's care. His entire relationship with mother exists within the confines of supervised weekly visits. That those visits were positive and consistent is not, on its own, a compelling reason to deprive D.M. of the permanency benefits of adoption. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1316 ["At best, mother's supervised interactions with [her infant son] amounted to little more than playdates for him with a loving adult"].) We affirm.

I

FACTS

A. *Detention*

Mother has a sad family history, which caused San Bernardino County Children and Family Services (CFS) to intervene when she gave birth to D.M. in September 2017. In 2013, mother's five-week-old daughter, H.M, died in the care of her biological father, L.M., while mother was at work. Though the autopsy report did not identify an exact cause of death, the autopsy revealed the infant had suffered serious previous, nonaccidental injuries, including a broken arm and seven rib fractures. At the time, mother and L.M. were married and raising two other children together, their biological

son, A.M., and C.E., mother's son with J.J. During the resulting dependencies of A.M. and C.E., a doctor at the Children's Assessment Center reviewed A.M.'s medical records and concluded he had suffered a nonaccidental fractured femur in 2012. The juvenile court ultimately denied mother reunification services with the children, and, in June 2014, terminated her parental rights to A.M. and placed C.E. with his father. The maternal grandmother (who lives with the maternal aunt) adopted A.M. In December 2014, L.M. was arrested for physically abusing mother and served six months in jail for domestic violence and false imprisonment. In January 2015, mother initiated, but did not complete, divorce proceedings.

Because of this background, CFS was notified when mother gave birth to another child by L.M. and immediately obtained permission to detain the newborn and place him with his brother A.M., in the home of the maternal grandmother and aunt.[1] The social worker interviewed mother and L.M. at the hospital. Mother confirmed L.M. was the biological father and said they had been married since 2011. L.M. said they were not currently living together. Mother told the social worker H.M. had died from Sudden Infant Death Syndrome (SIDS).

CFS filed a dependency petition on behalf of D.M., alleging the newborn fell within section 300, subdivision j (abuse of a sibling). On October 2, 2017, the juvenile

[1] CFS also detained C.E., as he was living with mother at the time. It turned out that shortly after C.E.'s dependency was closed in 2014, his father left him in mother's care. CFS filed section 300 petitions on behalf of both D.M. and C.E., but we do not discuss the facts of C.E.'s dependency because he is not a party to this appeal.

court detained D.M. in the home of the maternal grandmother and aunt, and granted mother supervised, two-hour visits once a week.

B. *Jurisdiction Hearing*

On October 20, 2017, CFS filed an amended petition for D.M., adding allegations under section 300, subdivision (b) (failure to protect) that he was at risk of suffering serious physical harm as a result of the parents' history of domestic violence. CFS recommended the court deny mother reunification services and set a permanency planning hearing for D.M. Although mother was attending visits and "appear[ed] to be loving and caring," the appropriateness and safety of her *interactions* with her son was not the issue. Rather, CFS's concerns arose from mother's apparent inability to protect D.M. from L.M.'s violence towards both her and her children. The social worker expressed concerns about mother's credibility. Although mother had told her she had not been in a relationship with L.M. since December 2015, D.M. was conceived in December 2016. A few weeks after CFS filed the amended petition, mother reinitiated divorce proceedings, and the divorce became final in March 2018.

In April 2018, the court held the contested jurisdictional hearing. Mother testified D.M. should not have been removed from her because she was no longer in a relationship with L.M. She said she had ended things with him in November 2014, well before the domestic violence incident in December 2014. Asked why she had stayed with L.M. after the 2014 dependency stemming from the abuse of H.M. and A.M., she said she had not believed back then that L.M. had harmed her children, and, as a result, had not

believed the juvenile court's findings were "valid." She said it was not until L.M. was violent towards her that she finally realized he had been the cause of her children's injuries.

She said she let L.M. come over on weekends after he was released from jail because a domestic violence program director had led her to believe his violence towards her was most likely a "one-time thing." She admitted she would sometimes leave C.E. unsupervised with L.M. She said D.M. was conceived as the result of the single sexual encounter she had with L.M. after the domestic violence incident. She said they had been drinking and it was a mistake.

She had invited L.M. to the hospital for D.M.'s birth because it was "still his baby." She had planned on letting him be a part of D.M.'s life, under her supervision. She said she had told L.M. when she was pregnant that "he was not to be alone with the baby until the baby was old enough to say whether or not he or she was being injured."

Mother testified she stopped letting L.M. spend weekends with her and C.E. in 2017. Asked why she had waited two years to finalize the divorce, she said she was "giving him a chance to change." She said she was starting a relationship with a new person and had checked to make sure he had no criminal history.

C.E., who was then 13 years old, gave testimony that conflicted with much of what mother had said about her interactions with L.M. For example, C.E. said that from 2015 to 2017, L.M. frequently stayed at their house and appeared to be in a loving relationship with mother. He also said L.M. continued to visit their house after D.M. was

born. Mother had never told C.E. that she and L.M. had broken up, and as far as C.E. knew, they were still a couple.

The court sustained the allegations in D.M.'s petition. It found mother was in denial when it came to L.M. and was not being honest about the extent of their relationship. It concluded mother's relationship with L.M. extended past October 2017 and that her long-term and recent involvement with him presented a substantial risk to her children.

C. *Disposition Hearing*

The court held the contested disposition hearing on May 1, 2018. Mother called the social worker as a witness. She testified mother had been cooperative and she had not seen any signs mother was continuing to keep in touch with L.M. When asked how visits with D.M. had been going, the social worker said she had been told by the CFS supervisor and the maternal aunt that visits had been appropriate. They had told her mother "appeared to be able to comfort the child if the child needed it" and that although the child was young, he "appeared to have a relationship" with mother. On cross-examination, the social worker expressed her opinion that mother should not receive reunification services. She based this opinion, in large part, on the fact mother had been dishonest to the court at the jurisdiction hearing about her relationship with L.M.

Mother testified she had not had any contact with L.M. for the last six months and did not intend to continue the relationship. She said she felt she should receive services, explaining "I'm not the problem" and "I don't think that it's fair that I am penalized or

punished for someone else's actions." She said D.M. "definitely lights up when I come around. He cries when I leave. My sister calls me to Facetime him to calm him down."

The court found mother was unable to protect D.M. from L.M. "[E]verything else [about] raising a child she is good at. It's her ability to protect. That is an issue." The court concluded mother's "blind spot," or inability to perceive the danger L.M. posed, created "a horrible situation to a child." The court removed D.M. from mother's custody and denied her reunification services.

D. *Permanency Planning Reporting and Mother's Section 388 Petition*

By the time of CFS's August 2018 status report, mother was visiting D.M. twice a week. The maternal grandmother or aunt would supervise the visits, and they reported that mother never missed a visit and always arrived early. D.M. would get excited when he saw her, and they would hug and kiss. Mother would play age appropriate games with D.M. and help him learn to walk.

On August 29, 2018, mother filed a section 388 petition, asking the court to return D.M. to her care or grant her reunification services. In her supporting declaration, she said she shared a strong bond with D.M. and had made substantial progress in programs and therapy. She also said that her sister, the maternal aunt, loved D.M. as much as she did. The maternal aunt submitted a declaration on mother's behalf. The aunt said D.M. had been in her care since he was released from the hospital and she had "built a very close bond" with him. She believed mother had taken "many strides in the right direction" and had come to "understand[] the severity of [her] situation." She said D.M.

would always be her top priority, and, if mother were given reunification services, she would visit mother's home often "to ensure he is being cared for responsibly."

CFS recommended denying mother's petition and selecting adoption as D.M.'s permanent plan. The social worker noted that if the aunt adopted D.M., mother would be able to remain in contact with him. The court denied the petition without a hearing, finding mother had not made a prima facie showing of substantially changed circumstances or that reunification would be in D.M.'s best interests.

E. *Termination of Parental Rights*

On April 8, 2019, CFS filed a report containing its assessment of the maternal aunt as the prospective adoptive parent. The aunt was 30 years old, stably employed, and had no criminal or child welfare history. She lived in a five-bedroom home with her mother (the maternal grandmother), her teenage brother (the maternal uncle), and D.M.'s brother, A.M. The aunt was not open to contact with L.M., but planned to allow mother supervised visits with D.M. as long as she remained appropriate. The aunt wanted to adopt D.M., and he was bonded to her.

The court held the permanency planning hearing on April 11, 2019. Mother testified she had a strong bond with D.M. and had never missed a visit. Counsel for CFS and D.M. argued adoption was the appropriate plan. Mother's counsel argued the parental benefit exception to adoption applied.

The court commended mother for having consistent, "very positive" visits, but concluded she had not demonstrated the strength of her relationship with her son

outweighed the permanency benefits of adoption. It found "very, very significant" the fact that D.M. had never lived with mother. "So, in reality, she has never been a parent to this child. A parent to this child, the entirety of his life, has been the aunt. That's who the child views as his mother and always has. And, frankly speaking, that is the person that has mothered the child." The court found D.M. adoptable and terminated mother's parental rights.

Mother timely appealed, arguing the court erred in finding the parental benefit exception did not apply.

II

ANALYSIS

When a parent fails to reunify and the dependency enters the permanency planning stage, "'the focus shifts'" from keeping the family together "'to the needs of the child for permanency and stability.'" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 ["By the time of a section 366.26 hearing, the parent's interest in reunification is no longer an issue and the child's interest in a stable and permanent placement is paramount"].) Thus, the Legislature prefers adoption as the permanent plan where possible. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) "At a permanency plan hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster care. [Citation.] If the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans." (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.)

Once the juvenile court finds a child is adoptable, the parent bears the burden of proving an exception to terminating parental rights exists. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) "[I]t is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1350.) The parental benefit exception at issue here applies when (i) the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship" and (ii) the court finds that the parent-child relationship presents a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1)(B)(i).)

Beginning with *In re Autumn H.* (1994) 27 Cal.App.4th 567, our appellate courts have routinely interpreted the parental benefit exception to apply to only those parent-child relationships the severance of which "would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed." (*Id.* at p. 575; *In re Jasmine D., supra,* 78 Cal.App.4th at pp. 1347-1348; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1161.) "The *Autumn H.* standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist, one of those exceptional circumstances being the existence of such a strong and beneficial parent-child relationship that terminating parental rights would be detrimental to the child and outweighs the child's need for a stable and permanent home that would come with adoption." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

"[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a *substantial, positive emotional attachment* such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re J.C.* (2014) 226 Cal.App.4th 503, 528-529, italics added.) We review the juvenile court's determination of whether the exception applies for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

In this case, it is undisputed mother maintained positive and consistent supervised contact with D.M. We therefore turn to whether she demonstrated they shared such a substantial, positive emotional attachment that freeing her son for adoption would pose a great detriment to him. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Mother argues she carried this burden because the record showed D.M. enjoyed their visits very much and was bonded to her. While we acknowledge mother never missed a visit and D.M. had positive reactions to her, unfortunately for mother, this evidence falls short of establishing that their relationship was so positive and substantial it outweighed the benefits of living in a permanent home with his aunt, grandmother, and brother. The parental benefit exception does not apply where the parent "has frequent contact with but does not stand in a parental role to the child." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.)

Mother argues she *did* occupy a parental role *during visits*, which was the only time she could interact with D.M. and prove the strength of their bond. She points to her testimony at the permanency planning hearing, when she told the court that during visits she "provided clothes for [D.M.], fed him, bathed him, taught him through educational games, redirected him when needed, put him to bed at night and nurtured him." However, because D.M. never lived with mother and these interactions occurred once or twice a week at most, the juvenile court could reasonably conclude the aunt, not mother, occupied the significant, positive role in D.M.'s life.

This case is similar to *In re Bailey J.*, *supra*, 189 Cal.App.4th 1308, where the child was detained at birth and had spent his entire young life in the custody of his foster mother. "As Bailey was detained when he was two days old, he spent no part of his life in the mother's custody. Her entire relationship with Bailey was established through supervised weekly visits. His foster mother, with whom he has been placed for his entire life, is his de facto parent, and she is the person who has provided for his 'physical care, nourishment, comfort, affection and stimulation.' [Citation.] At best, mother's supervised interactions with Bailey amounted to little more than playdates for him with a loving adult. Their frequent and loving contact was insufficient to show the requisite beneficial parental relationship." (*Id.* at p. 1316.) All of the cases mother attempts to analogize to are distinguishable on this very point. In each, the children had lived with the parent for a number of years before they were declared dependents and placed in foster care. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 471 [the child had spent nearly

nine years in the mother's care]; *In re S.B.* (2008) 164 Cal.App.4th 289, 298 [the father was the child's "primary caregiver for three years"]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 689 [the three children had lived with the mother for five years, three years, and seven months, respectively, and bonding study revealed they shared a strong attachment with her].)

Our courts have emphasized time and again that positive and loving visits, on their own, are not enough to outweigh the permanency benefits of adoption, especially where the child has never lived with the parent. "No matter how loving and frequent the contact, and notwithstanding the existence of an 'emotional bond' with the child, 'the parents must show that they occupy "a parental role" in the child's life.' [Citations.] The relationship that gives rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences.'" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) As the court explained in *In re S.B.*, a case on which mother relies, the parent-child relationship "typically arises from day-to-day interaction, companionship and shared experiences, *and may be continued or developed by consistent and regular visitation* after the child has been removed from parental custody." (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 299.)

In mother's case, because D.M. was detained at birth, there were no shared experiences for her to build on during visits. In other words, she was trying to establish, not continue, a significant parent-child relationship during visits. We do not doubt

mother cares deeply for D.M., but she has not shown that the juvenile court erred in finding the parental benefit exception did not apply.

III

DISPOSITION

We affirm the order.

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SLOUGH
Acting P. J.

We concur:

RAPHAEL
J.

MENETREZ
J.